

**ANNUAL REPORT
OF THE
PROBATE CODE STUDY COMMISSION**



**Indiana Legislative Services Agency
200 W. Washington Street, Suite 301
Indianapolis, Indiana 46204**

November, 2001

INDIANA LEGISLATIVE COUNCIL

2001

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PROBATE CODE STUDY COMMISSION

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Anne Haley
Attorney for the Commission

James Landers
Fiscal Analyst for the Commission

A copy of this report is available on the Internet. Reports, minutes, and notices are organized by committee. This report and other documents for this Commission can be accessed from the General Assembly Homepage at <http://www.state.in.us/legislative/>.

I. STATUTORY AND LEGISLATIVE COUNCIL DIRECTIVES

IC 2-5-16-2 directs the Commission to do the following:

"...study and recommend to the General Assembly needed changes in the following:

- (1) The probate code (IC 29-1).
- (2) The trust code (IC 30-4).
- (3) Other statutes affecting the administration of decedent's estate, guardianships, probate jurisdiction, trusts, or fiduciaries."

Legislative Council Resolution 01-2 assigned the following additional responsibilities to the Commission:

A. Uniform trust code (SCR 4)

II. INTRODUCTION AND REASONS FOR STUDY

Senate Concurrent Resolution 4 (SCR 4), authored by Senator Vi Simpson requested the assignment of the Uniform Trust Code to the Commission. SCR 4 states in part:

- ▶ The Uniform Trust Code was approved by the National Conference of Commissioners on Uniform State Laws at its 109th annual meeting August 3, 2000 and is the first attempt at the national level to provide the states with a comprehensive model for codifying their laws concerning trusts.
- ▶ The Probate Code Study Commission should examine the Uniform Trust Code for the purpose of recommending to the General Assembly whether the Uniform Trust Code should be adopted in whole or in part in Indiana.
- ▶ The Commission should suggest conforming amendments in existing provisions of the Indiana Code and the Uniform Trust Code to adapt all or part of the Uniform Trust Code in Indiana.

Before the first meeting of the Commission, Commission members were provided with Preliminary Draft 4369, a discussion draft containing the substance of the Uniform Trust Code but in the form and style required by the Legislative Council for legislative drafts.

III. SUMMARY OF WORK PROGRAM

The Commission met three times during the 2001 interim session.

September 19, 2001 meeting.

At the first meeting of the Commission, the Commission discussed the following:

- (1) The Uniform Trust Code.
- (2) The Uniform Principal and Income Act.
- (3) The intestate and elective share of a subsequent childless spouse.
- (4) Eliminating notice of appraisals, appraisal hearings and court determinations except to a person who requests it.
- (5) The legislative recommendations of the Indiana State Bar Association.

October 10, 2001 meeting

At the second meeting of the Commission, the Commission:

- (1) Discussed technical amendments to Senate Enrolled Act (SEA)190-2001.
- (2) Received testimony regarding the Uniform Trust Code.
- (3) Received testimony regarding the Uniform Principal and Income Act.
- (4) Discussed preliminary drafts (PDs) that were drafted from recommendations made by the Probate and Real Property Section of the Indiana State Bar Association.

October 23, 2001 meeting

At the third meeting of the Commission, the Commission:

- (1) Discussed and voted on PDs.
- (2) Received testimony concerning the penalties for refusing to accept the authority of an attorney in fact (IC 30-5-9-9).
- (3) Discussed the intestate and elective shares of a subsequent childless spouse.
- (4) Discussed and voted on the recommendations of the Commission.
- (5) Discussed and voted on the final report.

IV. SUMMARY OF TESTIMONY AND DISCUSSION

The Commission discussed and received testimony concerning various issues of trust and probate law. When the Commission authorized an issue to be placed into preliminary draft form, the Preliminary Draft (PD) is identified in the parentheses following the discussion.

The Uniform Trust Code

Senator Vi Simpson explained that she is a state commissioner of the National Conference of Commissioners on Uniform State Laws. Sen. Simpson informed the Commission that she had introduced Senate Concurrent Resolution 4 which resulted in the Legislative Council assigning the Uniform Trust Code to the Commission. She introduced John McCabe, Legislative Director of the National Conference of Commissioners on Uniform State Laws, and stated that Mr. McCabe would explain the Uniform Trust Code in more detail.

Mr. McCabe placed the proposed Uniform Trust Code within the context of trends in trust law and the potential for changes in the rules that apply to national banks. He described the Uniform Trust Code as a proactive response to the changing environment. He then described the features of the Uniform Trust Code, comparing and contrasting the provisions to current Indiana law. He indicated that the Uniform Trust Code is being introduced in legislatures around the country for the first time and that it has not yet had been adopted by any state.

Mr. Jeffery Kolb, representing the Indiana State Bar Association, expressed a personal preference for the Uniform Trust Code and then raised a number of questions about topics not addressed by the Uniform Trust Code, such as Medicaid eligibility for trust beneficiaries, the capacity of a trustee, and the statute of uses with regard to land trusts. Mr. Kolb also commented on the structure of PD 4369 and suggested that the number of chapters used chopped up the text too much. Ms. Cindy Wolfer, representing the Indiana State Bar Association, praised the Uniform Trust Code and said that it was a clarifying agent that Indiana law lacks. She also reviewed some of the areas in which the Uniform Trust Code differs from current Indiana trust law.

Mr. Dan Seitz, representing the Community Banker's Association and the Association of Indiana Life Insurance Companies, recommended that the Commission's review of the Uniform Trust Code go slowly, so as to avoid making mistakes.

Ms. Kerry Spradlin, Indiana Banker's Association, indicated that the Association could neither support or oppose the Uniform Trust Code in the upcoming session of the General Assembly. She reported that the Association was reviewing PD 4369 and communicating with their counterparts in other states, but would not be able to outline a position on the Uniform Trust Code until the early summer of 2002.

Indiana State Bar Association legislative recommendations

Mr. Jeff Kolb, representing the Indiana Bar Association, presented the Report of the Probate and Real Property Section of the Indiana State Bar Association which made the following legislative recommendations:

Indiana should adopt the Uniform Healthcare Decisions Act and repeal the existing healthcare provisions in the Power of Attorney Act and Healthcare Act.

- ▶ Indiana should adopt the Uniform Custodial Trust Act.
- ▶ IC 30-4-3-29 allowing a corporate trustee of a trust created after June 30, 1996 to be removed by a beneficiary should apply to trusts regardless of when the trust was created. (PD 3212)
- ▶ Rules should be added for interpreting trusts that would make the construction of trusts similar to the construction of wills. (PD 3429)
- ▶ Indiana should amend the rule against perpetuities to allow for the creation of a perpetual trust. (PD 3215)
- ▶ Amend IC 29-1-7-3 to specify that the person having custody of a will must deliver the will to the court upon written demand by the personal representative or upon court order. (PD 3489)
- ▶ Amend IC 29-1-2-7 to allow a putative father, for the purpose of inheritance, to execute a paternity affidavit to establish the paternity of a child born out of wedlock. (PD 3213)
- ▶ Amend IC 30-5-5-1 to specify that a power of attorney may in writing delete from, add to, or modify in any manner a power incorporated by reference. (PD 3219)
- ▶ Amend the law regarding nonprobate transfers to: (1) provide that a transferee of a nonprobate transfer is liable for allowed claims against a decedent's probate estate and statutory allowances to the decedent's spouse and children to the extent the decedent's probate estate is insufficient to satisfy those claims and allowances; (2) limit the liability of the nonprobate transferee to the value of nonprobate transfers received or controlled by the transferee; and (3) repeal IC 32-4-1.5-7 concerning the liability of a person who receives payment from a multiple party account for claims against the estate. (PD 3430)
- ▶ Amend the law to specify the length of time that an attorney in fact must retain records of transactions entered into on behalf of the principal and add provisions concerning the costs of the attorney in fact. (PD 3221)

Interest of subsequent childless spouse

The Commission discussed changing the intestate or elective share of a subsequent childless spouse from a one-third life estate to a fixed percentage. In addition, the Commission discussed clarifying the definition of "net estate" and "claims" under the Indiana Code in conjunction with the intestate or elective share of the subsequent childless spouse.

Notice of inheritance tax appraisal

The Commission discussed eliminating the requirement of giving notice of appraisals, appraisal hearings, and court determinations to those interested in the estate and requiring notice be given only to persons who file a request for notice. The Commission discussed specifying in the law that the request for notice must be filed with the county assessor. (PD 3231)

Uniform Principal and Income Act

The Commission received testimony from Kerry Spradlin, Indiana Banker's Association, and Thomas Quirk, Fifth Third Bank, who explained the conflict between the Uniform Principal and Income Act and a trustee's obligations under the Uniform Prudent Investor Act. The Uniform Prudent Investor Act requires trustees to invest trust assets in a manner that enhances the total return on the investment, which benefits income beneficiaries at the expense of remainder beneficiaries. Mr. John McCabe, National Conference of Commissioners on Uniform State Laws, stated that Section 104 of the Uniform Principal and Income Act is an attempt to reach a balance between the obligations of the Uniform Principal and Income Act and the Uniform Prudent Investor Act by providing a discretionary power to reallocate trust assets if the balance between income beneficiaries and remainder beneficiaries becomes skewed. Mr. Jeffery Kolb, Indiana State Bar Association, provided changes recommended by the Indiana State Bar Association concerning charitable remainder trusts and pensions. The Commission discussed a delayed effective date for the Uniform Principal and Income Act. The Commission discussed how New York and Delaware allow a trust to be converted to a "unitrust" which is not considered to be divided into principal and income.

Penalties for refusal to accept the authority of an attorney in fact

Ms. Kerry Spradlin, Indiana Bankers Association, discussed the damages and fees provisions that were added to IC 30-5-9-9 last year in Senate Enrolled Act 190. She stated that the treble damages provision is most troubling and could lead to abuse. She stated that the award of attorney's fees under IC 30-5-9-9 would be a sufficient measure to compel banks and other institutions to accept a power of attorney. In addition, IC 30-5-9-9 is deficient because it does not specify what constitutes refusal of a power of attorney. Ms. Spradlin testified that a timeline needs to be added

to the law indicating the adequate time for refusal of a power of attorney. She added that a defendant should also be able to recoup attorney's fees from a plaintiff. The Commission discussed how many of the suggested amendments were not contrary to the Commission's intent in drafting the amendments to IC 30-5-9-9. Ms. Spradlin discussed the possibility of the Indiana Banker's Association pursuing legislation on this issue in the 2002 session of the General Assembly.

V. COMMISSION FINDINGS AND RECOMMENDATIONS

Preliminary Drafts

The Commission recommends the following preliminary drafts of legislation (PDs) to the General Assembly:

PD 3213: Establishing paternity for inheritance purposes.
PD 3429: Construction of trust.
PD 3430: Liability of nonprobate transferees. (as amended)
PD 3212: Removal of corporate trustee by beneficiary.
PD 3214: Production of will in court. (as amended)
PD 3215: Rule against perpetuities. (as amended)
PD 3219: Power of attorney modifications. (as amended)
PD 3221: Power of attorney accounting and records. (as amended)
PS 3231: Notice of appraisal. (as amended)

Uniform Principal and Income Act and the Uniform Trust Code

The Commission voted unanimously to adopt the following findings and recommendations:

- (1) The Commission adopts the Uniform Principal and Income Act (UPIA) and the Uniform Trust Code (UTC) in principle.
- (2) The Commission finds it would be beneficial for interested parties to review the UPIA and UTC and provide their input to the Commission.
- (3) The Commission is willing to consider the UPIA and the UTC during the next interim after they have been reviewed by interested parties.

Subsequent childless spouse

The Commission voted unanimously to continue to review the issue of the subsequent childless

spouse during the next interim.

WITNESS LIST

Mr. William Fatout, Commissioner of the Probate Division of the Marion County Superior Court, Probate Committee of the Indiana Judicial Conference,

Jeffery Kolb, Indiana State Bar Association

John McCabe, National Conference of Commissioners on Uniform State Laws

Thomas Quirk, Fifth Third Bank

Dan Seitz, Community Banker's Association and the Association of Indiana Life Insurance Companies

Senator Vi Simpson

Kerry Spradlin, Indiana Bankers Association

Cindy Wolfer, Indiana State Bar Association